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No. 83-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MARY JONES, et al.,

Petitioners,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

1. In a civil rights class action, may a district court arbitrarily reduce the amount of attorneys' fees to be awarded that has been agreed upon by the parties, which the record establishes is clearly reasonable, which has been negotiated at arms' length, where there has been no collusion, and where there has been no injury to the interests of the class?

2. May a district court award fees in civil rights cases which are substantially below the levels awarded in other types of litigation (the issue sub judice in Blum v. Stenson, No. 81-1374)?

PARTIES

Mary Jones, Beverly Harris, Ernest Simmons, Mildred Malloy, petitioners. Amalgamated Warbasse Houses, Inc., New York State Division of Housing and Community Renewal, Richard Berman, respondents.

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October Term, 1983

MARY JONES, et al.,

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v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners Mary Jones, et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 14, 1983, affirming the decision of the District Court for the Eastern District of New York relating to an award of attorneys' fees.

CITATIONS TO OPINIONS BELOW

The opinion of the Court of Appeals is reported at 721 F.2d 881, and is set forth in the Appendix at pages 1a-18a. The Memorandum opinion of the District Court is reported at 97 F.R.D. 355 and is set out in the Appendix at pages 19a-46a. The supplemental memorandum opinion and order of the District Court is reported at 97 F.R.D. 362 and is set out in the Appendix at pages 47a-61a. Also set out in the Appendix at p. 62a is the report of the Magistrate recommending approval of the settlement agreed upon by the parties.

JURISDICTION

The judgment of the Court of Appeals affirming the decision of the District Court was entered on November 14, 1983. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE AND RULE INVOLVED

This case involves 42 U.S.C. § 1988 which provides, in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title [42 U.S.C.] * * * the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fees as part of the the costs. (R.S. 722 (1866) as amended, 90 Stat. 2641 (1976.)

This case also involves Rule 23(e), F.R. Civ. Proc., which provides:

> (e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.
>
> (As amended Feb. 28, 1966, eff. July 1, 1966.)

STATEMENT OF THE CASE

1. Proceedings Below

The present action was brought in 1980 by low-income black citizens against the

Amalgamated Warbasse Houses, Inc. and the New York State Division of Housing and Community Renewal. The complaint charged that the defendants had practiced racial discrimination with respect to the selection of tenants in State-supported housing. A settlement was reached on August 9, 1982, under the supervision of a United States Magistrate. The Magistrate recommended approval of the entire settlement, including the agreement as to attorneys' fees. (Appendix, p. 62a.)

Following notice to class members and the public, the district court issued its memorandum and order approving the settlement with regard to the merits in virtually all respects. However, the court rejected the parties' agreement with regard to attorneys' fees. The parties had negotiated and agreed to fees in the amount of $41,750, which resulted in hourly rates

for experienced counsel of $129 per hour. The district court reduced the amount to $25,600 by setting an across-the-board rate of $75 per hour for each of the three attorneys representing plaintiffs. (Appendix, 36a-43a.)

The plaintiffs moved to amend the court's order to restore the fees to the level agreed to by the parties. On February 18, 1983, the district court issued a supplemental memorandum and order denying the motion, but revising the distribution of the $25,600 awarded by a readjustment of the hourly rates to be given the three attorneys. Lead counsel was awarded $77 per hour and the other two attorneys awarded $70 and $60 per hour. (App. pp. 47a-59a.) On appeal this order was upheld by the Second Circuit, despite the state defendant's position that the

settlement should have been approved.[1/]

2. Statement of Facts

When the district court approved the settlement reached by the parties on the merits it found that it was fair and equitable and properly protected the rights of all class members. (App. 26a-36a.) The relief required the establishment of a special waiting list for minority citizens

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1/ In its Brief, the state asserted:

> Because all aspects of the settlement had been extensively reviewed and fully supported by the parties and the Attorney General of the State of New York, on behalf of the Commissioner, had evaluated and agreed to the reasonableness of the attorney's fee payable out of State funds, the District Court's rejection of the fee settlement came as a surprise. The parties had negotiated a fair and reasonable fee settlement, under the specific circumstances of the case, which was within the range of acceptable fee awards in the Circuit.

State Appellee's Brief, p. 6.

seeking units at the housing development, the elimination of the practice of giving priority to children of the existing tenants (a practice which necessarily excluded minority applicants), and the affirmative seeking of minority applicants for available housing.

It is clear from the record that an agreement on the merits was reached before any discussion of fees took place. Indeed, counsel for the plaintiffs were adamant that this procedure be followed so that there could be no question of any conflict between the interests of the class and that of counsel. The district court referred the case to a Magistrate to aid in settlement proceedings, and the Magistrate raised the question of fees after settlement on the merits had been reached, so that a complete package could be presented to the district

court. Thereafter, fee negotiations were conducted in the Magistrate's presence, and he recommended the approval of the entire settlement.

The district court found that the negotiations were at arms-length, were non-collusive, and that in no way were the interests of the class jeopardized by the agreement reached on fees. At the beginning of the fee negotiations plaintiff's counsel had sought hourly rates substantially higher than those ultimately agreed upon, and requested an adjustment to the lodestar to reflect the complexity of the case and the quality of representation. Defendant's counsel, on the other hand, opposed a multiplier and sought lower hourly rates. After considerable bargaining plaintiff's counsel agreed to a cutoff date for fees, dropped the request for a

multiplier, and the parties agreed on the total fee.

At the request of the district court counsel for plaintiffs filed an affidavit to support the negotiated fee. The submissions showed that each of plaintiffs' counsel were experienced in handling civil rights and class action litigation and had specific expertise in the field of housing discrimination. 2/

2/ Lead counsel Richard F. Bellman has practiced civil rights law since his admission to the Bar in 1963. From 1964 to 1967, he worked for the United States Commission on Civil Rights. From 1967 to 1968, he served as associate counsel for the NAACP. From 1969 to 1972, he was general counsel for the National Committee Against Discrimination in Housing. From 1972 to 1974, he was general counsel for Metropolitan Action Institute. Thereafter, Mr. Bellman became a partner in a private firm which specializes in employment and housing discrimination litigation (Joint Appendix on Appeal 84a). Mr. Bellman's affidavit listed the numerous housing discrimination cases he has handled.

Lawrence M. Grosberg became a member of the Bar in 1969. In the first five

Finally, it is clear that this case raised novel and complex legal issues. The essence of the challenge to the children's

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2/ continued

years of his practice, he was an associate in a New York law firm. From 1974 to 1979, he was managing attorney at Mobilization for Youth Legal Services. Since June 1979, he has served as director of the Columbia Law School Fair Housing Clinic and is a lecturer in law at the Law School. In conjunction with his teaching responsibilities, Mr. Grosberg specialized in housing discrimination litigation and acted as counsel to complainants or plaintiffs in more than 30 housing discrimination cases (J.S. 94a-96a).

Karen Freeman serves as general counsel for the Open Housing Center of New York, the organization which was the catalyst for the filing of this action and which plays a vital role in the implementation of the consent order. Ms. Freeman has been a member of the Bar for over eight years. She served as counsel to the Mayor's Office for Community Development in Boston, Massachusetts from 1974 through 1976. From March 1978 through April 1979, she was general counsel for the New York City Commission on Human Rights. Her role as general counsel for the Open Housing Center began in April 1979. In her capacities with the Center and the City Commission on Human Rights, Ms. Freeman has had extensive involvement in housing discrimination and fair housing litigation (J.A. 91a-93a).

list was that because the Wabasse development was predominantly white, a children's list would be predominantly white, thereby perpetuating the segregated nature of the development. Thus, it was argued that the list would have a racially discriminatory impact in violation of the federal Fair Housing Law. There was absolutely no case law involving challenges to preferential treatment for children at predominantly white housing projects. This case was apparently the first to present such an issue.[3/]

3/ Counsel argued in the motion for a preliminary injunction that the children's list should be viewed as a form of "grandfathering" analagous to actions in southern states involving discrimination in voting rights and jury selection. Plaintiffs also drew a parallel to court decisions regarding nepotism in building trade unions. Thus, in addition to precedents under the Fair Housing Act, decisions involving the Thirteenth and Fourteenth Amendments and Title VII of the Civil

The second aspect of the case raised equally difficult factual and legal issues. Plaintiffs argued that notwithstanding the fact that Warbasse was seeking to open its waiting list to outsiders, the method of publication of this action had a discriminatory effect on minority citizens. Plaintiffs asserted that Warbasse had an affirmative obligation to publish the fact of the opening of its outsiders' waiting list in the minority presses of New York City and that this duty flowed from the fact that the racial composition of the complex was overwhelmingly white. Again, there was no legal precedent on point to buttress this challenge.

3/ continued

Rights Act of 1964 were analyzed. See plaintiffs' memorandum in support of motion for preliminary injunction, dated January 5, 1980, at pp. 4-12.

REASONS FOR GRANTING THE WRIT

I.

Introduction

This case presents important issues in the growing body of law relating to attorneys' fees. Simply stated, the first issue posed is whether settlement and conciliation of attorneys' fees disputes will be encouraged, or whether they will result in protracted and major litigation and appeals. The question is not whether a district court may or, indeed should, review a settlement of attorneys' fees under the duty to supervise the settlement of the class action imposed by Rule 23(e) of the Federal Rules of Civil Procedure. Rather, it is whether once the court has determined that there has been arms' length, good faith, and non-collusive bargaining, and that the rights and interests of the class members have been

fully protected, it can substitute its judgment for that of the parties as to the appropriate hourly rate and amount. The second issue, which is essentially the same as the one presently before the Court in Blum v. Stenson, No. 81-1374 is whether the standard for awards in civil rights cases is to be different, and less favorable, than that governing in other federal litigation.

Petitioners urge that the courts below applied an erroneous standard in reviewing the fee agreement in this case and in civil rights cases generally. If allowed to stand the inevitable result of the decisions will be to encourage and, indeed, almost to require plaintiffs to engage in far more lengthy and complex proceedings when attorneys' fees are at issue. The consequence will be a greatly increased burden on the federal courts in resolving

attorneys' fees disputes as well as higher fees being paid by defendants because of the greater amount of time necessary to litigate fee matters. Further, the virtually open-ended and uncontrolled discretion given to district courts to reduce fees can only discourage attorneys from taking on civil rights cases.

II.

The Decision of the Court Below Is Inconsistent with Prior Decisions of This Court

The decision of the court below is fundamentally inconsistent with the decision of this Court in Hensley v. Eckerhart, ____U.S. ____, 76 L.Ed.2d 40 (1983). In Hensley both the majority (76 L.Ed. 2d at 53) and concurring (76 L.Ed. 2d at 64-65) opinions make clear that counsel fee matters should be dealt with in an expeditious fashion and that their voluntary

resolution is to be encouraged. The decisions of the courts below conflict with this basic principle.

Here, there is no question but that the parties negotiated fees fairly, without collusion, and at arms' length. They reached a result that was both reasonable and agreeable to all. Moreover, the record fully supports the hourly rates and the total amount awarded as reflective of the market value of the services of the attorneys involved, the novelty of the issues in the case, and the excellent results obtained. Nevertheless, the trial court rejected the settlement by essentially substituting its judgment for that of the parties as to what a reasonable fee should be. Thus, in its initial decision, the district court imposed an across-the-board $75 per hour rate with no adequate explanation of how it arrived at that rate. The

rate evidently was taken from the Equal Access to Justice Act (28 U.S.C. § 2412(d)(2)(A))[4] which Congress specifically stated should not govern civil rights cases.[5]

The decisions below would necessarily require plaintiffs to approach fee applications in a way that would result in the prolongation of attorneys' fees matters

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4/ App. p. 53a. See also, New York State Ass'n for Retarded Children, Inc. v. Carey, 711 F.2d 1136 (2nd Cir. 1983).

5/ Section 206 of the Act (Pub.L. 96-481) provides that nothing in § 2412(d), including the limitation in fees to $75 per hour, "alters, modifies, repeals, invalidates, or supersedes any other provision of Federal law . . . ." The House Report specifically states that the $75 rate "is not intended to affect or limit the computation of reasonable attorney fees under any other provision of law authorizing an award of fees for litigation under a particular statute, such as the Civil Rights Acts, designed to promote private enforcement of that Act." H.R. Rep. No. 96-1418, 96th Cong., 2d Ses., reprinted in 1980 U.S. Code Cong. & Ad. News 4984, 4994. The district court here also referred to the Criminal Justice Act, 18 U.S.C. § 3006A (1982), which also has no relevance to civil rights acts cases.

and, in many cases, their unnecessary litigation. Thus, even in cases where the parties are agreed on a fee, plaintiffs, in order to protect their interest in ensuring that the settlement will be approved, would have to submit to the district court a detailed statement of the hours, the tasks spent, the expertise of the attorneys, and data as to prevailing market rates. In short, they would have to make precisely the same showing that they would have to in a litigated fee dispute to challenge the disallowance of fees as being unreasonable or arbitrary.

The decision of the courts below would also undercut a standard practice in fee cases where only the reasonableness of the hours is at issue, i.e., stipulating as to reasonable hourly rates (see, e.g., Tasby v. Wright, 550 F. Supp. 282 (N.D. Tex. 1982)), since the district court could

look beyond such a stipulation and substitute its judgment for that of the parties. Finally, not only would the decision below result in unnecessary litigation in the district courts but, it would also result in additional appeals in those cases where the trial court had reduced fees below the amount agreed to without a sufficient basis in the record for its action.[6/]

6/ Petitioners are not suggesting that a district court, particularly in a class action, has no role except to rubber stamp an attorneys' fee settlement. Under Rule 23(e) the Court has the obligation to review any settlement of a class action and ensure that the interests of the absent class members have been adequately considered and protected. In the present case the fee negotiations were monitored by a Magistrate (who recommended approval of the amount), were not collusive, and the interests of the class members were in no way adversely affected. Under these circumstances a district court should approve the fees in the amount agreed on by the parties.

III.

The Decision Below Conflicts with The Congressional Purpose in Passing The Civil Rights Fees Provisions

Although the court below gave lip service to the principle that fees in civil rights cases should be awarded at the same levels as those in other types of litigation, the actual decision approving the reduction of the fee substantially conflicts with it. Thus, this case present issues closely similar to those now before the Court in Blum v. Stenson, No. 81-1374.

In Blum, as here, the underlying issue is whether fees are to be awarded in civil rights cases at the market rate that an attorney may command in similar types of litigation, or whether lower fees should be the norm. In both instances the problem is the same; if, in civil rights, cases fees are awarded at below market

rates then there will be a natural disincentive for attorneys to take them on.

The clear Congressional purpose, however, was to encourage the private bar (and public interest organizations), to take on the enforcement of the civil rights statutes by providing for fees at levels commensurate with those which an attorney might command in the market place.[7/]

Here, on the other hand, the courts below reduced agreed-upon fees by application of a number of principles inconsistent

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7/ Thus, Congress recognized that the "civil rights laws depend heavily upon private enforcement" (S. Rep. 94-1011, 94th Cong. 2d Sess. (1976), p. 2), and that the unavailability of fees was resulting in "private lawyers . . . refusing to take certain types of civil rights cases" because they "could not afford to do so." (H. Rep. 94-1558, 94th Cong., 2d Sess. (1976), pp. 2-3.) Therefore, the amount of fees awarded is to "be governed by the same standards which prevail in other types of equally complex Federal litigation, such as anti-trust cases . . . ." S. Rep. at p. 6.

with Congress' intent. These included the notion that fees in civil rights cases should be "moderate", presumably in comparison with fees in other types of cases. Further, when fees are awarded against a public defendant they should be lowered even, as here, when the public defendant had agreed to the amount.[8/] Finally, the "perception of the public", however it was to be determined, should be taken into account.

None of these principles have any support in the statutory language or the legislative history of the fees Act. Not only is it clear that Congress intended fees in civil rights cases to be the same

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8/ As noted above, (see n. 1, supra) the state defendant took the position in the court of appeals that the district court should be required to approve the settlement as agreed upon by the parties.

as in other types of litigation, [9] but one of its main concerns was that when a public defendant was sued public moneys, without limit, were used to defend illegal or unconstitutional acts. Thus, a central purpose was to ensure that prevailing plaintiffs in such cases recover full fees from public funds. [10]

9/ See n. 7, supra.

10/ See H. Rep. No. 94-1558, p. 7. See also, Awarding of Attorneys' Fees, Hearings Before the Subcomm. on Courts, Civil Liberties & the Administration of Justice of the House Comm. on the Judiciary, 94th Cong., 1st Sess. at 61. Congress heard specific examples. There was

> the Prince Edward County [school desegregation] case, which was one of the serious instances of contemptuous violation of law . . . . We find in that case, which has gone on for nearly 15 years, there was only one phase during the entire case during which the plaintiffs' lawyers were awarded fees paid and that amounted to $19,000.

Finally, "the perception of the public" has been expressed by the elected representatives of the public who sit in Congress. It was simply impermissible for the court below to substitute its judgment for that of the House and Senate as to what should be the governing principles for fee awards in civil rights cases.

10/ continued

> During that same period, the school board lawyers, the county lawyers and the State's lawyers were getting their fees paid in full at all times . . . . [B]ut for the same period in which the plaintiffs' lawyers were awarded $19,000, the defendants paid their lawyers $150,000 for the service of having enabled them to go into contempt of court.

The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcomm. on Representation of Citizen Interests of the Comm. on the Judiciary, United States Senate, 93rd Cong., 1st Sess. at 834-35 (1973).

Conclusion

For the foregoing reasons the petition for a writ of certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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APPENDIX

DECISION OF THE COURT OF APPEALS
Nov. 14, 1983

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 14 - August Term, 1983

Argued September 15, 1983
Decided November 14, 1983

Docket No. 83-7181

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MARY JONES, et al.,

Plaintiffs-Appellants,

v.

AMALGAMATED WARBASSE HOUSES, INC., et al.,

Defendants-Appellees.

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BEFORE:

FEINBERG, Chief Judge,
LUMBARD and NEWMAN, Circuit Judges.

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FEINBERG, Chief Judge:

This case requires us to decide the extent of a district court's discretion to modify an agreement as to attorneys' fees, otherwise awardable under 42 U.S.C. § 1988, which has been submitted to the court pursuant to Fed. R. Civ. P. 23(e) for approval as part of a proposed settlement of a class action civil rights suit. Plaintiffs Mary Jones and other class representatives appeal from a judgment of the United States District Court for the Eastern District of New York, Thomas C. Platt, J., approving in all respects a negotiated settlement of their housing discrimination suit against defendants Amalgamated Warbasse Houses, Inc. (Warbasse) and the New York State Division of Housing and Community Renewal and its Commissioner (collectively referred to as the State Division), except for the amount

of attorneys' fees, which the court reduced from a total of $41,350 to $25,600. A provision for reimbursement of $400 in costs was left undisturbed. For reasons given below, we affirm the judgment of the district court.

I.

In their complaint, plaintiffs alleged systematic exclusion of Black and Hispanic persons from a 2,585-unit publicly subsidized housing development in violation of the Thirteenth and Fourteenth Amendments to the United States Constitution; Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq.; 42 U.S.C. §§ 1981-1983; and the New York Human Rights Law, N.Y. Exec. Law § 296(2-a) (McKinney 1982). The housing complex is operated by defendant Warbasse, a limited profit mutual housing company supervised by defendant State Division. Plaintiffs requested, and

the settlement order granted, certification pursuant to Fed. R. Civ. P. 23(b)(2) as representatives of the class of all Black and Hispanic (Caribbean and Central American) persons who have sought or may seek to live in the Warbasse complex. Plaintiffs sought preliminary and permanent injunctive relief, actual and exemplary damages for the named plaintiffs, and other relief. Defendants moved to dismiss the complaint, and the district court reserved decision on the preliminary relief sought and the motions to dismiss pending the outcome of settlement negotiations.

The case was referred to Magistrate A. Simon Chrein, who assisted in the later stages of the negotiations on the substantive claims and in the entire negotiations concerning attorneys' fees. The parties agreed to, and submitted to the court for approval, a proposed order that provided

significant relief to the class in the form of revised procedures for filling vacancies, including the establishment of a minority waiting list and the elimination of a special waiting list for children of existing tenants. The district court found that these procedures will virtually insure that nearly a tenth of the units will be filled by class members. The proposed orders also incorporated the defendants' agreement to pay attorneys' fees of $41,350 and costs of $400.

After notice of the proposed settlement was published in the minority press and mailed to all applicants on the existing waiting lists, written comments were received and a hearing was held. Thereafter, in a memorandum and order dated November 15, 1982, the court approved the proposed settlement and order. The Court found that there was no evidence to suggest

collusion among the opposing attorneys in formulating the settlement, that the attorneys had sufficient experience in class action litigation to arrive at a fair and reasonable compromise, that the decisions of the attorneys were informed, that no class members had objected, and that the interests of the class members were served. With respect to the attorneys' fees provided for in the settlement, however, the court expressed concern that the proposed fees "seemed out of line with other matters which it has been called upon to review." Citing Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980), rev'g Selzer v. Berkowitz, 477 F. Supp. 686 (E.D.N.Y. 1979), cert. denied, 451 U.S. 970 (1981), and other authority, the court reduced the fees from approximately $129 per hour to approximately $75 per hour, and the total fee requested of $41,350 plus $400 in

costs to $25,600 plus $400 in costs. Adopting the same proportion used in the negotiated settlement, the court allocated $15,880 of this total to be paid by defendant Warbasse and the remaining $10,120 by defendant State Division.

Thereafter, plaintiffs' attorneys moved to amend the November 15 order by restoring the fees to the negotiated level. In a supplemental memorandum and order of February 18, 1983, the court considered and rejected a number of arguments by plaintiffs' counsel in support of the higher fees and provided a more extended explanation for the figure it had set and now declined to increase. In particular, the court explained that in fact it had followed the two-step "lodestar" approach called for by City of Detroit v. Grinnell Corporation, 495 F.2d 448, 470-71 (2d Cir. 1974)(Grinnell I) and City of Detroit v.

Grinnell Corporation, 560 F.2d 1093, 1098-99 (2d Cir. 1977)(Grinnell II). The court also refined the $75 per hour average on which the figure was based to provide $77 per hour to the lead attorney, Richard F. Bellman of Steel & Bellman, P.C., and $70 per hour and $60 per hour, respectively, to the other two attorneys in the case, Lawrence Grosberg of the Columbia University Fair Housing Clinic and Karen Freeman of the Open Housing Center of New York.

II.

Both plaintiffs and the State Division argue that the district court abused its discretion in setting aside the agreement as to attorneys' fees. They acknowledge the role of the court in guarding against collusion, inexperienced counsel, inadequate information, adverse class impact and windfall. Plaintiffs maintain, however,

that once they have determined that a proposed settlement is not tainted in any of these respects, the judge is not free to set aside a fee agreement negotiated by the parties at arms' length that falls within a range of fairness and reasonableness. Plaintiffs also point to the judicial policy favoring out-of-court settlement and argue that a presumption in favor of a negotiated fee agreement attaches when there is no finding of irregularity, lest the incentive to settle be undermined. The State Division offers similar reasoning, maintaining that a settlement of fees, like a settlement on the merits, imposes some limits on the reviewing court's discretion. It further argues that a fee agreement negotiated by a responsible public official, such as the State Attorney General, who is charged with protecting the interests of state residents and taxpayers,

should not lightly be rejected. Defendant Warbasse argues that the court has a duty to make an independent evaluation of the reasonableness of the attorneys' fees regardless of the parties' agreement and that the court did not abuse its discretion in reducing the fees to the amount it found reasonable.

We reject the argument that the district judge, in light of his findings, could not reduce the fee award. It must be emphasized that a district court has broad discretion to determine the amount of a fee award to be made pursuant to 42 U.S.C § 1988. Hensley v. Eckerhart, 103 S.Ct. 1933, 1941-42 (1983); Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979), aff'd, 448 U.S. 122 (1980). The presence of an arms' length negotiated agreement among the parties weighs strongly in favor of approval, but such an agreement is not

binding on the court. Piambino v. Bailey, 610 F.2d 1306, 1328 (5th Cir.), cert. denied, 448 U.S. 1011 (1980); Foster v. Boise-Cascade, Inc., 577 F.2d 335 (5th Cir. 1978)(per curiam), aff'g 420 F. Supp. 674 (S.D. Tex. 1976); Levin v. Mississippi River Corp., 377 F. Supp. 926, 930-31 (S.D.N.Y.)(Weinfeld, J.), aff'd, 508 F.2d 836 (2d Cir. 1974), cert. denied, 429 U.S. 833 (1976). A district court's discretion is not limited to situations in which it finds windfall, adverse class impact, or other irregularity in a fee agreement. Despite the absence of such factors, if the court finds good reason to do so, it may reject an agreement as to attorneys' fees just as it may reject an agreement as to the substantive claims. The court's perspective and obligations are different from those of the parties. Malchman v. Davis, 706 F.2d 426, 435-36 (2d Cir. 1983);

Grinnell I, 495 F.2d at 469-70; Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., 481 F.2d 1045, 1049-51 (2d Cir.), cert. denied, 414 U.S. 1092 (1973). The judge's duty to safeguard the public interest is especially important when no class members are likely to object and the aggregate impact of a settlement is greater than the impact on any one defendant. Thus, this court has indicated that fee awards under § 1988 should be moderate, see Grinnell I, 495 F.2d at 469-70, and additionally that a court has an obligation under Fed. R. Civ. P. 23(e) in any class action to make sure that a class is taken care of fairly, especially in a settlement where no one is likely to complain.

On the other hand, the court must consider competing policies as well. There is the congressional policy favoring fee awards in order to enforce the civil rights

laws by private litigation. See McCann v. Coughlin, 698 F.2d 112, 128 (2d Cir. 1983); Mid-Hudson Legal Services, Inc. v. G & U, Inc., 578 F.2d 34, 36-37 (2d Cir. 1978). Fee shifting is still not that common and a statute specifically authorizing it should not be construed in a niggardly manner. Moreover, there is the important policy of encouraging settlements. See Hensley v. Eckerhart, 103 S.Ct. at 1941. The settlement process is undermined if the court attaches little weight to the fact that the parties have reached an agreed figure reflecting, as in this case, compromise on both sides. In exercising its discretion, the district court must reconcile these policies on the facts of each case. In deciding whether to accept fee settlements, the court should treat them essentially as it treats settlements on the merits, according them a presumption of regularity

once it finds no impropriety, but aware that the presumption can be overcome for good reason, including the impact on the class, the public perception of the appropriateness of the fees, and the range of awards allowed in similar cases. Once a court has decided that a fee settlement should not be accepted, we think it need not limit itself to the alternative of outright rejection, but may exercise its discretion to determine a reasonable fee. The court has a special responsibility to supervise the matter of attorneys' fees in class actions and in any litigation involving a fee-shifting statute like section 1988. Even in a case such as this, where any decrease in the amount of the fees will not inure to the benefit of the plaintiff class, which received only injunctive relief, the court's downward revision of a fee settlement unacceptable to the court

will promote confidence in the integrity of the judicial process and is a proper exercise of authority over officers of the court in litigation pending before the court.

In the instant case, the district court carefully considered the many factors relevant to a decision whether to accept or reject a fee settlement and set out its reasons for rejecting the fees agreed upon and for making a reduction. See Johnson v. Georgia-Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974, cited with approval in Hensley v. Eckerhart, 103 S.Ct. 1937-38. We note that the court also mentioned the participation of a governmental agency in the negotiations and its endorsement of the results as "a factor weighing heavily in favor of settlement approval." We believe that the court did consider as significant the fact of settle-

ment of the fee dispute as well as of the underlying dispute. While not all of us would have reduced the fee award when, as here, a federal magistrate assisted in the negotiations and the State Attorney General joined in the negotiations and the agreement, we all agree that on this record we cannot say that the court abused its discretion in doing so.

III.

Plaintiffs' remaining arguments require little discussion. Plaintiffs argue that the court erroneously reduced the fee award in part because public funds were involved. We have no reason to doubt the judge's explanation in his supplemental memorandum and order that this fact caused him to scrutinize the fee arrangement with more care, but was not a reason for the reduction. Plaintiffs also contend that the court did not follow the two-step

"lodestar" approach mandated by Grinnell I, 495 F.2d at 470-71, and Grinnell II, 560 F.2d 1098-99. While it is true that rates awarded to civil rights counsel should ordinarily be on par with market rates for private attorneys engaged in other complex federal litigation, S. Rep. No. 1011, 94th Cong., 2d Sess. 6 (1976), reprinted in 1976 U.S Code Cong. & Ad. News, 5908, 5913; New York State Association for Retarded Children, Inc. v. Carey, No. 82-7531, slip op. at 4563, 4587 (2d Cir. June 15, 1983), and it is preferable for the district court to make express findings as to what those rates are, we believe the court satisfied this requirement by looking to the hourly rates awarded in comparable recent cases. We do not need to reach the arguments concerning the adequacy of counsel's time records because, despite passing reference to this issue in

a footnote of its supplemental memorandum and order, the court did not rely on inadequacy of time records in reaching its decision. It is worth noting, however, that the burden is on counsel in the first instance to submit detailed contemporaneous time records. New York State Association for Retarded Children, Inc. v. Carey at 4582-84; Hensley v. Eckerhart, 103 S.Ct. at 1943 (Burger, C.J., concurring); McCann v. Coughlin, 698 F.2d at 131.

The judgment of the district court is affirmed.

MEMORANDUM AND ORDER

OF DISTRICT COURT, Nov. 15, 1982

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CV 80-344

MEMORANDUM & ORDER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARY JONES, BEVERLY HARRIS, ERNEST SIMMONS, MILDRED MALLOY, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

AMALGAMATED WARBASSE HOUSES, INC., NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

==========

PLATT, D.J.

The parties to this would-be class action seek approval of an Order and Judgment of Consent (settlement agreement) submitted pursuant to Fed. R. Civ. P.

23(e). No class members objected to the proposed settlement at a hearing on October 15, 1982, and none submitted opposition in writing. For this reason and those that follow, the agreement will be approved.

I. Introduction

Plaintiffs allege that Amalgamated Warbasse Houses, Inc. (Warbasse), a limited-profit mutual housing company located near the Coney Island section of Brooklyn, and the New York State Division of Housing and Community Renewal (Division)[1/] systematically prevented Black and Hispanic citizens from obtaining apartments at the 2,585-unit Warbasse complex, thereby violating the Thirteenth and Fourteenth Amendments to the United States Constitution, Title VIII of the Civil Rights Act of 1968 (42 U.S.C. § 3601 et seq. (1977)), 42 U.S.C. §§ 1981-1983 (1981), and the New York Human Rights Law

(N.Y. Exec. Law § 296(2-a)(McKinney 1982).

This action was commenced on December 16, 1980. Shortly thereafter, both defendants moved to dismiss, while the plaintiffs sought injunctive relief. However, decision was reserved pending the outcome of settlement talks initiated, or at least encouraged, by Division Commissioner Richard Berman, a co-defendant. Magistrate A. Simon Chrein subsequently assisted in the negotiations, and on August 9, 1982 the parties submitted the proposed settlement agreement. This Court thereupon ordered that notice of the settlement be published in the minority press and mailed to each of the approximately 1,570 apartment applicants on the Warbasse waiting list. Comments were to be submitted by October 8, 1982. The hour-long hearing took place a week later.

II. The Settlement Agreement

As an initial matter, plaintiffs are to be certified pursuant to Red. R. Civ. P. 23(b) (2) as representatives of the class of all Hispanic (Caribbean and Central American) and Black persons who have sought to may seek to live in the Warbasse complex.[2/] Order and Judgment of Consent, ¶ 2.[3/]

Second, to compensate for past underrepresentation of class members at Warbasse, defendants will establish a minority list and fill 215 apartments from it. Applications will be solicited through notice in the general and minority media. The list is to be divided by apartment size into three groups: 121 one-bedroom units, 67 two-bedroom units, and 27 three-bedroom units. According to preference, individuals will be placed in one of these groups, in the order in which their applications

are received.[4] Then they will be "shuffled" into the existing (outsiders') list of non-Warbasse residents waiting for units, in the following ratios: one minority applicant to five outsiders for one-bedroom units; two minority applicants to seven outsiders for two-bedroom units; and one minority applicant to three outsiders for three-bedroom units. ¶¶ 6(c)(ii), 11. In each case, the minority applicant or applicants will be selected before the individuals on the outsiders' list[5] ¶¶ 11, 12. When the 215th unit is filled, the minority list will cease to exist.[6]

Third, Warbasse residents will continue to receive priority in seeking transfers to other units within the complex. ¶ 9.

Fourth, the "children's" list is to be closed, and those currently on it will

be "shuffled" into the outsiders' list, five outsiders to every child.[7/] ¶ 10. Heretofore, the former has placed the sons and daughters of Warbasse residents in a preferred position.

Fifth, the outsiders' list -- for which income is the only admission criterion -- will be maintained, although applicant solicitation is to be extended to the minority press. ¶ 24. Class members both on and off the minority list may apply for admission to the outsiders' list on equal terms with all others. However, no one will be permitted to remain on both lists. ¶ 25. Moreover, each minority group member beyond 100 on the outsiders' list will reduce by one the total number that Warbasse must accept from the minority list. ¶ 25.

Finally, defendants have agreed to pay plaintiffs' attorneys' fees and costs

totaling $41,750. ¶ 27. This will be reduced to $26,000, a matter discussed in Part IV.

III. Discussion

To win court approval, a class action settlement generally "must be fair and reasonable and in the best interests of all those who will be affected by it." 7A C. Wright & A. Miller, Federal Practice and Procedure § 1797, at 229 (1972) [hereinafter cited as Wright & Miller]. See Weinberger v. Kendrick, No. 81-7317, slip op. at 3944-45 (2d Cir. July 14, 1982) (Friendly, J.), aff'g 91 F.R.D. 494 (S.D. N.Y. 1981); Tornabene v. General Development Corp., 88 F.R.D. 53, 61 (E.D.N.Y. 1980), aff'd mem., No. 80-9044 (2d Cir. March 3, 1981), modified (July 31, 1981); West Virginia v. Charles Pfizer & Co., 314 F. Supp. 710, 740 (S.D.N.Y. 1970), aff'd, 440 F.2d 1079 (2d Cir.), cert.

denied, 404 U.S. 871, 92 S.Ct. 81, 30 L.Ed.2d 115 (1971). While the settlement proponents bear the burden of demonstrating fairness, 7A Wright & Miller § 1797, at 229 "[v]oluntary out of court settlement of disputes is 'highly favored in the law,'" Wellman v. Dickinson, 497 F. Supp. 824, 830 (S.D.N.Y. 1980) (quoting D.H. Overmyer v. Loflin, 440 F.2d 1213, 1215 (5th Cir.), cert. denied, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971)), aff'd, 682 F.2d 355 (2d Cir. 1982); Newman v. Stein, 464 F.2d 689 (2d Cir.), cert. denied, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 488 (1972); see Tornabene v. General Development Corp., supra, and "approval of class action settlements will be generally left to the sound discretion of the trial judge." Wellman v. Dickinson, 497 F. Supp. 824 at 830 (citations omitted). This is particularly true in Fair Housing Act cases, where

the alternative to voluntary agreement -- a court-ordered injunction -- may inhibit cooperation and voluntary compliance. Williamsburg Fair Housing Committee v. New York City Housing Authority, 450 F. Supp. 602, 606 (S.D.N.Y. 1978). See Alexander v. Gardner-Denver Co., 415 U.S. 36, 44, 94 S.Ct. 1011, 1017-18, 39 L.Ed.2d 147 (1974) (Title VII). Moreover, a proposed settlement "carries ... its own presumption of regularity and is subject to approval by the trial court after hearing proferred objections." Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d 1006, 1013 (7th Cir. 1980)(consent decree in discriminatory zoning case). Thus, the court will not substitute its judgment for that of counsel who, after the type of arm's-length bargaining that took place in this case, "have made a determination that the settlement repre-

sents a fair and real appraisal of their clients' chances of ultimate success." Siegel v. Realty Equities Corp. of New York [1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 94,102, at 94,446 (S.D.N.Y. 1973). See Weinberger v. Kendrick, supra, slip op. at 3946 (examination by court of settlement's substantive terms necessarily must be limited).

Nevertheless, when reviewing a class action settlement the District Court also is "'a fiduciary who must serve as a guardian of the rights of the absent class members.'" City of Detroit v. Grinnell Corp., 560 F.2d 1093 (2d Cir. 1977)(quoting Gruinin v. International House of Pancakes, 513 F.2d 114, 123 (8th Cir. 1975), cert. denied, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975)). In fulfilling its role, the court looks to the following factors: (1) the presence of collusion in

reaching the settlement; (2) counsel's experience in handling similar cases; (3) the extent of discovery and its impact on counsel's ability to make an informed decision as to the merits of the case and the fairness of the settlement; and (4) the objections of class members. George v. Parry, 77 F.R..D. 421 (S.D.N.Y.) (civil rights action), aff'd mem., 578 F.2d 1367 (2d Cir.), cert. denied, 439 U.S. 947, 99 S.Ct. 340, 58 L.Ed.2d 338 (1978); Bacote v. Long Island Savings Bank, No. 78 Civ. 1285, at 1 (E.D.N.Y. Sept. 1, 1982); Connolly v. New York City Transit Authority, No. 74 Civ. 1085, at 4 (E.D.N.Y Jan. 26, 1982); Tornabene v. General Development Corp., supra; Duban v. Diversified Mortgage Investors, 87 F.R.D.. 33, 38-41 (S.D.N.Y. 1980); Munsey Trust v. Sycor, Inc., 457 F. Supp. 924, 926 (S.D.N.Y. 1978); Feder v. Harrington, 58 F.R.D. 171 (S.D.N.Y. 1972).

These factors need not be exhaustively analyzed in this case, for it is amply clear that the settlement survives scrutiny.

First of all, not one grain of evidence suggests that opposing counsel colluded in drawing up the 19-page settlement agreement. In the absence of such evidence -- at least where the proposed agreement on its fact suggests that a bona fide compromise has been crafted -- the settlement is presumed to be regular. Metropolitan Housing Development Corp. v. Village of Arlington Heights, 616 F.2d at 1013-15. Here, many signs of compromise exist. Not only did the named plaintiffs initially seek damages in addition to injunctive relief, but the relief requested for the entire, open-ended class could have been equally open-ended (at least in duration), and it could have involved far more than 215 units (6 percent of the

total) at Warbasse. Moreover, class members will not be given full priority over others on the outsiders' list. Rather, as described above, they will be "shuffled" into the pack, in adjustable ratios now ranging from one:three to one:five. Current residents, virtually all of whom could never become members of the minority class, will continue to receive full priority with regard to internal transfers.[8/]

At the same time, plaintiffs have obtained significant relief -- the virtual guarantee that nearly a tenth of the units at the Warbasse complex will be occupied by members of minority groups. Merely by way of observation, we note that these 215 minority units may provide the "critital mass" needed to create and maintain a more heterogenous community at Warbasse.

Second, we find that counsel have had

sufficient experience in class action litigation to arrive at a fair and reasonable compromise. The lead attorney for the class was ably assisted by lawyers from the Fair Housing Clinic at Columbia University and the Open Housing Center. On the other side, attorneys representing Warbasse received assistance from the New York State Division of Housing and Community Renewal. That a government agency participated in successful compromise negotiations and endorsed their results is a factor weighing heavily in favor of settlement approval -- at least where, as here, the agency is "committed to the protection of the public interest." Wellman v. Dickinson, 497 F. Supp. 824 at 830 (SEC participation).

Third, it is clear from the affidavits accompanying the several motions that the attorneys have made an informed decision as to the merits and the fairness of the

compromise. Although little formal discovery has occurred, the parties freely exchanged data during settlement talks.[9/] In view of the way this speeds the negotiation process, informal "discovery" is to be encouraged. Settlement is particularly appropriate where these preliminary inquiries indicate that the litigation will be long and complex, and the outcome far from certain. Beecher v. Able, 72 F.R.D. 518, 520 (S.D.N.Y. 1976)(Motley, J.), mod., 441 F. Supp. 426 (S.D.N.Y. 1977), aff'd, 575 F.2d 1010 (2d Cir. 1978); West Virginia v. Charles Pfizer & Co., Inc., supra.

The final and "crucial" factor in evaluating the fairness of the settlement agreement is whether the interests of the class members have been taken into account. 7A Wright & Miller ¶ 1797, at 182 (Supp. 1982). To ascertain this, the court should

consider how knowledgeable plaintiffs' attorneys were, and whether opponents presented persuasive argument sagainst the settlement. We concluded above that plaintiffs' attorneys are well-informed. Moreover, not a single class member submitted a written statement prior to or appeared at the hearing on October 15, 1982. This leads to only one, obvious concusion: that the class supports the settlement.

Although one oral and five written objections were submitted by non-class members,[10/] the ocurt has serious doubts as to whether it must consider these comments, see Kusner v. First Pennsylvania Corp., 74 F.R.D. 606, 611 (E.D. Pa. 1977) (settling oefendant's shareholder not permitted to intervene and object), aff'd mem., 577 F.2d 726 (3d Cir. 1978), particularly where, as where, State law grants Warbasse the power to sue and be sued, N.Y.

Priv. Hous. Fin. Law § 17(1)(j) (McKinney 1976). These individuals may continue to pursue whatever rights they may have to force Warbasse to redress allegedly improper actions taken in settling this lawsuit. Moreover, even assuming that the objections must be considered, we find that they do not alter the outcome. First of all, the six opponents comprise only a tiny fraction (0.38 percent, to be precise) of those currently on the outsiders' list, and surely a tinier one when compared to the numer of persons presently in the certified class. Second, most of these comments make one point: that each individual earned his place on the waiting list and that settlement approval will interfere impermissibly with this "entitlement." The short, and sole, answer is that no such entitlement exists. Outsiders are not being forced to

forfeit their status as members of the list; rather, they merely may have to wait somewhat longer for an apartment. This potential delay is not legally significant and therefore does not provide a basis for disapproving the settlement. See, e.g., Franks v. Bowman Transportation Co., 424 U.S. 747, 775-78, 96 S.Ct. 1251, 1269-71, 47 L.Ed.2d 444 (1976) (union seniority system). Put another way, although opponents complain that the glass is now half empty, it is really half full: The settlement might have eliminated the outsiders' list entirely, and in the process return each person on it to parity with all new applicants.

IV. Attorneys' Fees

Plaintiffs' attorneys have requested attorneys' fees of $41,350 and costs of $400, or a total of $41,750 for their

services in this matter. Lead counsel, Richard S. Belman, Esq. in an affidavit sworn to October 18, 1982, has stated that he spent 241 hours, that Lawrence Grosberg, Esq., of the Fair Housing Clinic at Columbia University, spent 60 hours and that Karen Freeman, Esq., of the Open Housing Center, spent 20 hours working on this case. He sets the value of their services at approximately $129 per hour. By his own admission, however, Mr. Belman states that "A substantial portion of my work related to [the] negotiations" which led ultimately to the proposed consent now before this Court. Mr. Belman does state that the fees themselves were the subject of negotiations between the parties and that they were ultimately agreed to by counsel for the defendants herein. In this case, if the defendants were private parties dealing with private funds this Court might

be tempted to assume "reasonableness" and to accept the results of these negotiations in the absence of any indication of collusion. However, here both defendants, for the most part at least, are dealing with taxpayers' funds. Under these circumstances, this Court feels constrained to scrutinize the attorneys' request with more care.

As an initial matter, once a court has determined that attorneys' fees are to be awarded, the amount of the award is within the discretion of the court. Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 844, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); 3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.91, at 23-566 (2d ed. 1982). This discretion, however, is not unbounded. Factors that a trial judge should consider in computing a fee award include

the following:

(1) The time and labor required.

(2) The novelty and difficulty of the questions.

(3) The skill requisite to perform the legal service properly.

(4) The preclusion of other employment by the attorney due to acceptance of the case.

(5) The customary fee.

(6) Whether the fee is fixed or contingent.

(7) Time limitations imposed by the client or the circumstances.

(8) The amount involved and the results obtained.

(9) The experience, reputation, and ability of the attorneys.

(10) The "undesirability" of the case.

(11) The nature and length of the professional relationship with the client.

(12) Awards in similar cases.

Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974); Selzer v. Berkowitz, 477 F. Supp. 686 (E.D.

N.Y. 1979). After taking into account each of these factors, we are convinced that a fee reduction is in order. It should be stressed that

> [e]ven where there has been no objection to the size of the attorney's fee requested, it is the responsibility of the court to see to it that the size of the award is reasonable.

3B J. Moore & J. Kennedy, Moore's Federal Practice ¶ 23.91, at 23-568 (2d ed. 1982). See 42 U.S.C. § 1988 (1981) (court may award "reasonable" attorney's fee to prevailing party in civil rights action).

This court is particularly concerned that the requested fees seem out of line with other matters which it has been called upon to review. For example, in Selzer v. Fleisher, 629 F.2d 809 (2d Cir. 1980), rev'g Selzer v. Berkowitz, 477 F. Supp. 686 (E.D.N.Y. 1979), cert. denied, 451 U.S. 970 (1981), also a civil rights case, the plaintiff was represented by the

firm of Donovan Leisure Newton & Irvine, 30 Rockefeller Plaza, New York, and Walter L. Stratton, Esq., one of the senior trial partners in that firm (also a very experienced trial lawyer) who tried the case, valued his and his partners' time at $125 per hour and the time of his associates and others at substantially less per hour.[11/] By way of contrast to the case at bar, both sides in that case took extensive depositions, conducted protracted and complicated pretrial discovery and briefed and argued numerous complex legal questions before, during and after the eight-week jury trial, which resulted in a substantial verdict for the plaintiff. When this Court in that case approved the indicated attorneys' fees of $125 per hour and less, the Court of Appeals for this Circuit implied that these fees were excessive in the following language:

> Appellants challenge as excessive the trial court's award of attorneys fees in the amount of $433,458.78. In the event that the trial court is again called upon to fix attorneys fees, we are confident it will note, as this Court has recently suggested in Seigal v. Merrick, 619 F.2d 160, 164, Nos. 79-7420, 79-7444 (2d Cir. 1980), that any award must be proportionate to the result achieved.

629 F.2d at 814 (footnote omitted). See also Tornabene v. General Development Corporation, supra (court reduced fees and costs to 36 percent of figure agreed to by defendants). The work involved in this case does not begin to measure up to the complexity and difficulty of the work in that case. Moreover, the results achieved in that case were on a comparative basis substantially greater than the results achieved here. Under these circumstances, this Court feels it is compelled to reduce the hourly rate rquested by the plaintiffs from approximately $129 per hour to approximately $75 per hour, yielding the

plaintiffs' attorneys a gross fee of $24,000 plus $400 in costs. In order to make an allowance for any additional work that may be necessary in connection with the implementation of the order herein, the Court will round the gross fee to $25,600 plus $400 in costs, or a total of $26,000.

Based upon the proportion heretofore adopted between the defendants, the amount of the $26,000 allocable to the defendant Warbasse will be $15,880 and the amount allocable thereof to the Division will be $10,120.

SO ORDERED.

UNITED STATES DISTRICT JUDGE

1/ As a Mitchell-Lama project (see N.Y. Priv. Hous. Fin. Law § 10 et seq. (McKinney 1976)), Warbasse is supervised by the New York State Division of Housing and Community Renewal (the Division).

2/ According to data developed by the Division, 99 percent of the residents of Warbasse were White and 1 percent were members of minority groups as of July 10, 1980. Affidavit of Edmund Davis, exhibit 1.

3/ Hereinafter, references to the proposed settlement will be by paragraph number only.

4/ The four named plaintiffs have 30 days from the entry of the Order and Judgment on Consent to request placement at the top of the minority list. ¶ 6(f). No objections to this provision have been filed, and even if they had been, disapproval would not be warranted since the advantage is not excessive. Luevano v. Campbell, 93 F.R.D. 68, 89 (D.D.C. 1981); Bacote v. Long Island Savings Bank, No. 78 Civ. 1285, at 5 (E.D.N.Y. Sept. 1, 1982). Moreover, minorities presently on the outsiders' list may request placement on the minority list in their existing order, although in back of the named plaintiffs who exercise their option. ¶ 6(f).

5/ The settlement provides for subsequent adjustment of these ratios to ensure that all the units in each category are filled at approximately the same time. ¶ 23.

6/ Subject to Division approval, the agreement permits Warbasse to place up to 100 additional names on "reserve status." ¶¶ 6(c)(iv), 7. Conversely, if too few minority group members apply for housing, the agreement obligates Warbasse to solicit applicants on up to three additional occasions. ¶8.

7/ Until now, one name has been taken from the children's list for every five names taken from the outsiders' list. Thus, those presently on the children's list will lose nothing vis-a-vis outsiders.

8/ See supra note 2.

9/ Plaintiffs' interrogatories to Warbasse and to the Division went unanswered. Neither side took depositions. However, plaintiffs apparently sought to demonstrate discriminatory impact, an approach that might well find most useful the type of data amply provided by way of affidavit and appendix thereto.

10/ Five currently are on the outsiders' or the children's list, while the sixth wrote on behalf of a parent on

10/ continued

the outsiders' list. We emphasize that everyone on an existing waiting list received mailed notification of the proposed settlement, comment deadline, and hearing date.

11/ In that case, plaintiffs' counsel spent 5,481.25 hours of attorney time plus 2,118.25 hours of para-attorney (i.e., summer associates, student interns, and paralegals) time. As we pointed out in our opinion, the average legal and para-legal time charge there was $60.00 an hour. 477 F. Supp. at 690-91 & n.3.

SUPPLEMENTAL MEMORANDUM AND ORDER
OF DISTRICT COURT, Feb. 18, 1983

CV 80-3444

SUPPLEMENTAL MEMORANDUM & ORDER

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MARY JONES, BEVERLY HARRIS, ERNEST SIMMONS, MILDRED MALLOY, Individually and on Behalf of All Others Similarly Situated,

Plaintiffs,

- against -

AMALGAMATED WARBASSE HOUSES, INC., NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Defendants.

==========

PLATT, D.J.

At issue is the fee award ordered in the settlement of a housing discrimination class action. Defendants Amalgamated Warbasse Houses, Inc. (Warbasse) and the

New York State Division of Housing and Community Renewal (Division), in settling the case, agreed to a total of $41,350 in fees. In a Memorandum & Order dated November 15, 1982 (the November 15 Order), the Court approved all aspects of the settlement except for the fee agreement. On that score, we reduced the total figure to $25,600, which -- after including $400 in costs not affected by the reduction -- was allocated as follows: $15,880 to be paid by Warbasse and $10,120 by the Division. Looked at another way, the fee as reduced will provide compensation at the rate of $75 an hour (not including $1,600 for additional work to be performed); the pre-reduction rate was approximately $129 an hour.

Pursuant to Fed. R. Civ. P. 59(e), plaintiffs' attorneys seek to amend the November 15 Order by restoring the award to

its negotiated level. The fee reduction is attacked on numerous grounds. The more significant among these are that (1) in recent settlements of a like nature, courts have authorized awards equal to or exceeding the negotiated amount; (2) significant time was devoted to drafting pleadings, pre-trial motion practice, and discovery -- in short, to matters some would argue are more complex than settlement negotiations; (3) settlement of this particular class action was as difficult as more highly remunerated settlements because it involved intricate and novel issues; (4) all three attorneys, and especially lead counsel Richard P. Bellman, possess great expertise and experience in fair housing and class action litigation; and (5) contrary to this Court's asserted conclusion, the portion of the award paid by Warbasse will not directly or indirectly

affect State taxpapers.

After considering these points, the subsidiary matters, we conclude that the fee reduction was appropriate and hence decline to amend the November 15 Order.

It is important initially to note that, while Courts have only limited discretion to deny fees to settling plaintiffs, their discretion in determining the amount of the award is quite broad. Grunin v. International House of Pancakes, 513 F.2d 114 (8th Cir.), cert. denied, 423 U.S. 844, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). We certainly are not bound by the negotiated settlement, Levin v. Mississippi River Corp., 377 F. Supp. 926, 931 (E.D. N.Y. 1974), and to the extent our discretion is limited, it is limited by the obligation to ensure that the fee award is reasonable -- indeed moderate. Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir.

1980); City of Detroit v. Grinnell Corp., 495 F.2d 448, 470 (2d Cir. 1947). 42 U.S.C. § 1988 (1981).

Considering the objections in order, it is not true, in the first place, that in all recent settlements of civil rights cases courts have awarded fees at a higher rate. While some have, e.g., Bradford v. Blum, 507 F. Supp. 526 (S.D.N.Y 1981)($125 an hour for experienced private counsel), others have not, e.g., Cleary v. Blum, 507 F. Supp. 514 (S.D.N.Y. 1981)($75 an hour for experienced private counsel). As the Second Circuit recently had occasion to point out, a fee award need not be set at "the rate which a lawyer charges his other clients." McCann v. Coughlin, Nos. 82-2213, 82-2220, slip op. at 1153 (2d Cir. Jan. 6, 1983). The award here is well within the range of reasonableness. This is particularly true given the fact

that lead counsel Bellman, who has practiced law for about 20 years, with 15 years' experience in civil rights litigation, billed only 241 of the 321 hours plaintiffs' counsel had logged by the time the settlement agreement was completed. The remainder was billed by less experienced counsel, Lawrence M. Grosberg (13 years of practice, eight in the civil rights area), and Karen Freeman (about eight years of practice, six in civil rights). The $25,600 award represents a $75-an-hour rate of compensation. This is a fair average, considering both the facts that lead counsel billed only three-quarters of the total number of hours logged, and that the $75 across-the-board figure includes all work, from the most routine to the most challenging. In addition, the fee here is in line with the $60 an hour fee award granted by this Court

in Selzer v. Berkowitz, 477 F. Supp. 686, 690-91 (E.D.N.Y. 1979), and discussed in the November 15 Order.[1/] Moreover, we note that two analogous attorney fee statutes, although not controlling here, support the conclusion that a $75-an-hour average is adequate, to say the least. The first, the Equal Access to Justice Act, Pub. L. 96-481, Tit. II, § 203 (to be codified at 28 U.S.C. § 504) and § 204 (to be codified at 28 U.S.C. § 2412), imposes a fee ceiling of $75 an hour against federal defendants, absent a showing of special circumstances.[2/] The second, the Criminal Justice Act, 18 U.S.C. § 3006A (1982), limits compensation to $30 an hour for in-court time, and $20 an hour for reasonable out-of-court time, for attorneys appointed to the constitutionally vital task of representing indigent criminal defendants -- situations in which a per-

son's liberty usually is at stake. 18 U.S.C. § 3006A(d)(1).[3/]

Plaintiffs also assert that the award was established without first designating a "lodestar" figure -- the fee that attorneys of similar experience would receive for like work -- and then adjusting the total to take into account such factors as the risk and complexity of the litigation. See Cohen v. West Haven Board of Police Commissioners, 638 F.2d 496, 505 (2d Cir. 1980). However, the November 15 Order show the result of applying the two-step Cohen analysis;[4/] and although counsel has now supplied the Court with additional detail, it does not change the result. To be explicit, the $25,600 total -- taking into account each attorney's litigation (and especially civil rights) experience described above -- is calculated according to the "lodestar" method, as follows: Mr.

Bellman, who spent 241 hours on this case, is to be compensated at the rate of $77 an hour, for a sub-total (see infra) of $18,557; Mr. Grosberg, who spent 60.5 hours, at $70 an hour, for a total of $4,235; and Ms. Freeman, who spent 20.5 hours, at $60 an hour, for a total of $1,230. Adding the total for each attorney in turn yields $24,022 which, rounded to $24,000 is $1,600 less than the $25,600 award. Counsel has advised the Court that further work will be necessary to implement the order. The additional $1,600 will be allocated to Mr. Bellman as payment for this work. At his $77 rate, this provides for 20.8 extra hours.[5/]

After considering adjustment of each "lodestar," we conclude that they should remain as they are in view of (1) the comparatively small risk involved for plaintiffs' counsel; (2) the relatively

uncomplicated nature of the litigation; and (3) the fact that the settlement represents a compromise -- plaintiffs did not "win." See Selzer v. Fleisher, 629 F.2d at 814 ("any award must be proportionate to the result achieved").

Plaintiffs' second essential objection -- that, contrary to the asserted implication of the November 15 Order, significant time was devoted to matters putatively more complex than settlement negotiations -- is an extension of the first. Mr. Bellman has submitted an affidavit stating that only 114 of his 241 hours were devoted to the settlement process. The remainder was spent in initial work with the plaintiffs (preparing, filing, and amending the complaint) (30.5 hours); pretrial interrogatories (19.67 hours); motion for preliminary injunction (43.32 hours); and opposing motions to dismiss (33.75 hours).[6/] However,

we did not mean to (and believe we did not) imply that negotiation is less difficult than other preliminary litigation matters. Rather, in addition to counsel's experience, the key factor in determining the rate of compensation was that this lawsuit was settled before it became necessary to take extensive depositions, brief numerous legal points, or prepare for the -- most importantly -- conduct a protracted jury trial. Compare Selzer v. Berkowitz, supra.

Plaintiffs' third and fourth objections are, we believe, adequately answered by the above discussion. The abstract complexity of the issue is less important than the type of work performed, and the result achieved. These factors have already been considered. Moreover, although counsel's qualifications are not in doubt, we believe that the approved compen-

sation accurately reflects those qualifications.

Finally, plaintiffs argue that Warbasse's share of the settlement does not involve taxpayers' funds, and that, even if it did, the Court would not be justified in taking that factor into account (as it is alleged to have done) in setting attorneys' fees. While we question the assertion that the Warbasse portion has no impact on taxpayers' funds (and note that the Division's portion certainly does), the matter need not be decided for we merely stated in the November 15 Order that the involvement of public money merely prompted the Court "to scrutinize the attorneys' request with more care." However, the request was reduced not because of the public funds involved but because of the factors discussed in more detail above.

In summary, plaintiffs have not convinced this Court that its initial determination was wrong. Therefore, the motion to amend the November 15 Order will be denied.

SO ORDERED:

UNITED STATES DISTRICT JUDGE

1/ As we pointed out on p. 14 of that Order, Walter L. Stratton, lead counsel in that case, valued his time at $125 an hour. However, Mr. Stratton then had about 27 years of litigation experience, far more than any of plaintiffs' counsel here. In addition, the cost of overhead at his law firm, Donovan Leisure Newton & Irvine, most likely was considerably greater than the total cost to all three attorneys in this case. Moreover, on appeal the Second Circuit suggested that the award was excessive. Selzer v. Fleisher, 629 F.2d 809, 814 (2d Cir. 1980), cert. denied, 451 U.S. 970 (1981).

2/ These include cost-of-living increases, and the limited availability of qualified attorneys.

3/ In addition, the Act sets maximum fees, e.g., $1,000 per attorney for felony trials.

4/ See November 15, 1982 Memorandum & Order at 14-15 & n.11.

5/ It should be kept in mind that we have made a rather generous estimate of additional time which Mr. Bellman may be required to work on this matter, to wit: some 20 additional hours at $77 per hour. If little or no such additional work is required, Mr. Bellman's hourly fee in the matter will average about $83.50 an hour.

6/ Mr. Grosberg's affidavit reveals that he spent the bulk of his time involved in initial legal research, client interviews, discovery and factual investigation. Ms. Freeman divided her time roughly between court appearances, meetings and settlement discussions, according to her affidavit. We also note the possibility that some duplication of effort may occur when more than one attorney works on a case. To show that this did not happen, the three plaintiffs' counsel could have submitted more detailed time records. They did not, and the burden squarely rested on their shoulders to have done so. McCann v. Coughlin, Nos. 82-2213, 82-2220, slip op. at 1154-55 (2d Cir. Jan. 6, 1983).

Magistrate's Report, August 12, 1982

UNITED STATES GOVERNMENT

M E M O R A N D U M

August 12, 1982

A. Simon Chrein
United States Magistrate
Jones v. Amalgamated Warbasse Houses
Civil Action No. CV 80 344

Honorable Thomas C. Platt
United States District Judge

After several meetings with the parties, agreement has been reached disposing of this litigation. I enclose, with my recommendation that the Court grant its approval, a stipulation of settlement in this case.

/s/
A. SIMON CHREIN
United States Magistrate

ACS/ls